

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELVIN OTHELL TURNER,

Defendant-Appellant.

UNPUBLISHED

April 9, 2002

No. 229022

Eaton Circuit Court

LC No. 00-020055-FC

Before: Cavanagh, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with a person under the age of thirteen), one count of first-degree criminal sexual conduct (CSC I) (sexual penetration with a person under the age of thirteen), MCL 750.520b(1)(a), and one count of furnishing obscene material to a minor, MCL 750.142. Defendant was sentenced to concurrent terms of five to fifteen years’ imprisonment for each CSC II conviction, eleven to twenty-five years’ imprisonment for the CSC I conviction, and ninety days’ imprisonment for the furnishing obscene material to a minor conviction. We affirm.

Defendant initially argues that the trial court erred when it precluded him from introducing evidence that the victim previously made false accusations of sexual assault against another man. We disagree. This issue is reviewed for plain error affecting substantial rights because defendant failed to preserve it for appeal by seeking the admission of this evidence in the lower court.¹ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In a prosecution for a sexual offense, a defendant may cross-examine the victim about a prior false accusation of a similar nature and submit proof of the false accusation if the victim denies making it. *People v Mikula*, 84 Mich App 108, 115; 269 NW2d 195 (1978). A defendant

¹ A review of the lower court file reveals that defendant moved to disqualify the prosecutor from this case because she prosecuted another case where the victim in this case was the complainant. However, there is no indication in the record that defendant sought to introduce evidence concerning the prior accusation at trial. In his brief on appeal, defendant has failed to direct our attention to any such instance.

is permitted to show that the victim has made false accusations of rape in the past, *People v Garvie*, 148 Mich App 444, 448; 384 NW2d 796 (1986), citing *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984), because the false accusation bears on the victim's credibility. *People v Dale Williams*, 191 Mich App 269, 272; 477 NW2d 877 (1991). However, to introduce testimony regarding a prior false accusation, the defendant must make an offer of proof, supported by "concrete evidence," showing that the prior accusation was false. *Id.* at 273; see also *Hackett, supra* at 348-351; *People v Adamski*, 198 Mich App 133, 142; 497 NW2d 546 (1993).

Defendant's argument that the trial court abused its discretion in disallowing such evidence is without merit. "[T]here can be no abuse of discretion where the trial court's discretion has not been invoked in the first place." *People v Rice (On Remand)*, 235 Mich App 429, 438-439; 597 NW2d 843 (1999). Even if defendant had requested the court to exercise its discretion, the proposed testimony would not have been admissible because defendant failed to show that the victim's alleged prior accusation against another man was false. *Adamski, supra* at 142. Thus, defendant failed to show plain error affecting his substantial rights. *Carines, supra* at 763.

Defendant also asserts that his attorney denied him effective assistance of counsel by not moving for the introduction of this testimony. Defendant did not preserve this issue for appeal because he failed to move for a new trial or an evidentiary hearing; therefore our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). We find no merit to defendant's assertion that trial counsel's performance was deficient. An attorney does not render ineffective assistance by failing to argue a meritless position or raise a futile motion. *Id.* at 425; *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). In the instant case, although there is some indication that the victim had alleged sexual abuse against another individual in the past, there is no record support for defendant's assertion that the prior accusation was false. Thus, defendant has failed to establish that trial counsel's decision to not pursue this issue was not the product of sound trial strategy. *People v Davis*, 248 Mich App 655, 666; ___ NW2d ___ (2001).

Defendant next asserts that he is entitled to a new trial because the trial court did not permit him to introduce evidence of the victim's father's alleged bias or prejudice – namely, that the victim's father filed a civil lawsuit against defendant and defendant's wife for the assaults in this case. We disagree. This issue is reviewed for plain error affecting substantial rights because defendant failed to preserve this issue at trial. *Carines, supra* at 763. Because defendant did not move for the admission of this evidence, there can be no abuse of discretion where the trial court's discretion has not been invoked in the first place. *Rice, supra* at 438-439. Thus, there was no plain error affecting defendant's substantial rights.

Finally, defendant asserts that he may have been denied effective assistance of counsel because his trial counsel shared office space with the attorney representing the victim and the victim's parents in a civil suit filed against defendant and defendant's wife in Eaton Circuit Court.²

² This Court denied defendant's motion to remand regarding this issue in an order entered (continued...)

Whether defendant was denied the effective assistance of counsel is a constitutional question that this Court reviews de novo. *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001). To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient under an objective standard of reasonableness and that there is a reasonable probability that, but for the deficiency, the jury would not have convicted the defendant. *Snider, supra* at 423-424. An attorney is presumed to have rendered effective assistance of counsel. *People v Garza*, 246 Mich App 261, 255; 631 NW2d 764 (2001).

On the basis of the existing record, there is nothing to support defendant's mere speculation that he was denied the effective assistance of counsel. The present record does not support defendant's suggestion that the mere fact that his trial counsel shared office space with the attorney representing the victim's family in a subsequent civil lawsuit rendered his counsel's performance at trial deficient in any manner. Affidavits of both defendant's trial counsel as well as the other attorney attached to the appellate briefs reflect that the two did not discuss defendant's case or share information. Moreover, defendant's trial counsel averred that he was not aware of a pending civil lawsuit against defendant. Thus, defendant has not overcome the heavy presumption of effective assistance of counsel.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Peter D. O'Connell

(...continued)

February 13, 2001.